IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: ***Canadian Broadcasting Corporation v. Canada (Border Services Agency)*****, 2020 NSPC 29**

In the Matter of an Application to Vary Sealing Orders,
Criminal Code s. 487.3

BETWEEN:

Canadian Broadcasting Corporation, Canadian Television Network, Global News, The Canadian Press, Globe and Mail, Post Media, Halifax, Examiner and Saltwire.
- Applicants

- and -

Her Majesty the Queen in the Right of Canada (Canada Border Services Agency)
and
Her Majesty the Queen in the Right of Nova Scotia (Royal Canadian Mounted Police)
- Respondents

Judge: The Honourable Judge Laurel Halfpenny MacQuarrie

Heard: July 3, 2020 in Port Hawkesbury, Nova Scotia

Decision July 16, 2020

Counsel: Mark Covan and Scott Millar, for the Federal Crown
Mark Heerema and Shauna MacDonald, for the Provincial Crown
David G. Coles, QC, for the Applicants

By the Court:

[1] On April 28, 2020 the Canadian Broadcasting Corporation, through its representative, Elizabeth McMillan, filed with the Provincial Court of Nova Scotia a "Notice of Application" requesting:

- An Order lifting the Sealing Order over Informations to Obtain;

[2] The reason for the request was:

- A general warrant was issued by a provincial court judge or justice of the peace under section 487.01 of the Criminal Code of Canada permitting the RCMP to search property belonging to Gabriel Wortman.

- There is a sealing order in place related to this warrant.

- This application is to have the sealing order lifted pursuant to the Open Court Principle

- Such further and other grounds as this Honourable Court may permit.

[3] It was supported by reasons and identified in the application as the "Factum of the Applicant".

[4] Since that initial application, several other parties have been added as Applicants. They include:

- Canadian Television Network
- Global News
- The Canadian Press
- Globe and Mail
- Post Media
- Halifax Examiner
- Saltwire

[5] They are represented by Mr. David Coles, Q.C..

[6] The Respondent was not identified on the Notice of Application. It was forwarded by Truro Court Services staff to the local Crown Attorney's office who in turn

sent it to the Special Prosecutions Branch of the Public Prosecution Service of Nova Scotia (PPS). The Royal Canadian Mounted Police (RCMP), were identified as Respondents by the PPS as Her Majesty the Queen in the Right of the Province of Nova Scotia.

[7] Subsequently the Canada Border Services Agency became a Respondent represented by the Public Prosecution Service of Canada (PPSC), as representing Her Majesty the Queen in the Right of Canada. The Serious Incident Response Team (SiRT) have identified an interest in these proceedings and those interests are also being represented by the PPS.

[8] The original application was for unsealing of a general warrant. At the time of that application, no general warrant was in existence nor does one form part of this application. The application however, at this point in time, has identified five search warrants and two Production Orders in its scope. They are:

1. Search Warrant, dated April 20, 2020 pursuant to s. 487.1.
2. Search Warrant, dated April 20, 2020 pursuant to s. 487.1.
3. Search Warrant, dated April 23, 2020, pursuant to 487.1.
4. Search Warrant, dated April 24, 2020 pursuant to s. 487.1.
5. Production Order, dated April 24, 2020 pursuant to s. 487.014(3).
6. Search Warrant, dated April 24, 2020 pursuant to s. 487.014(3).
7. Search Warrant, dated April 24, 2020 pursuant to s. 487.1.

[9] Section 487.3(1) provides the authority for a judicial sealing of such authorizations.

> (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or any authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior

> court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and disclosure of, any information relating to the warrant, order or authorization on the ground that:
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> (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to subsection (2) or the information might be used for an improper purpose; and
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> (b) the reason referred to in paragraph (a) outweighs in importance the access to the information.

[10] Subsection (2) and (3) provide:

> (2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice will be subverted by the disclosure
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> (a) if disclosure of the information would
>
> (i) compromise the identity of a confidential informant,
> (ii) compromise the nature and extent of an ongoing investigation,
> (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
> (iv) prejudice the interest of an innocent person; and
>
> (b) for any other sufficient reason.
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> (3) Where an order is made under subsection (1) all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or is varied under subsection (4).

[11] Subsection 487.3(4) provides for termination or variance of an order under s. 487.3(1):

> (4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

[12] Unlike an order for sealing which has an enumerated list of reasons for granting such, subsection (4) is silent as to unsealing. There are no Rules of Court in Nova Scotia covering this, or anywhere in the country, which could be found. It is that which brings us here today.

[13] The parties attempted to resolve the question of procedure outside the Court but were unsuccessful. I will begin by thanking all counsel for their very thorough briefs and fulsome oral submissions.

Position of the Parties

Applicants

[14] The principle of openness in Court proceedings, and repudiation of covertness, as established in *Nova Scotia (Attorney General) v. MacIntyre* [1982] 1 S.C.R. 175, can only be fully arrived at by requiring the veil of police investigation in the form of search warrants, and other judicial authorizations, be lifted. *MacIntyre*, related to privacy interests and the administration of justice.

[15] At paragraphs 53-55 of *MacIntyre*:

> [53] By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament, that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of, 'openness' and respect of judicial acts…
>
> [54] The concern for accountability is not diminished by the fact that the search warrants might be issued by a justice in camera. On the contrary this fact increases the policy argument in favor of accessibility. Initial secrecy surrounding the issue of warrants may lead to abuse, and, publicity is a strong deterrent to potential malversation.
>
> [55] In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

[16] The Applicants rely heavily on the process adopted by the former Chief Judge of the New Brunswick Provincial Court, Les Jackson, in *Saint John Police Force,* Re

[2012] N.BJ. No. 365. (*In the Matter of an Application by the Saint John Police Force for the Extension of a Sealing Order Dated December 15, 2011 in Respect of a Search Warrant and a Production Order Issued in Relation to the Richard Oland Homicide Investigation*).

[17] It was an application by the CBC seeking to unseal search warrants and Information's to Obtain (ITO's). This process was then followed in the *Canadian Broadcasting Corporation et al v. Saint John Police Force et al*. 2013, NBQB 167, specifically, paragraphs 3 – 10. Justice Grant allowed cross-examination of the Affidavit by the applicant's counsel. It was *in camera* and he ordered a ban on publication.

[18] Mr. Coles advocates this to be the preferable process so as to ensure the principles of *MacIntyre* are achieved.

[19] To follow the Crown's proposal would in effect provide the Crown two opportunities to advance its position. Allowing the Crown to do a direct examination *in camera* and *ex parte and* again on the merits hearing, is unfair to the Applicant's.

[20] He indicates, as an officer of the Court, he would enter a confidentiality undertaking. Such would neither be awkward nor professionally undesirable as suggested by the Crown. An *in camera* confidential disclosure of facts has never placed him in such a position. This would be the process as well for argument, and those matters which are confidential would be done *in camera* and, those not, would be argued in open court. This procedure is the only way to ensure a thorough cross-examination and the court would thereby be able to make the most informed decision.

[21] In support of this, he refers to Justice Campbell's decision in *John Doe and Jane Doe v. The Halifax Regional Police Force Service, Constable Gary Bassol, and Constable Ashley Lewis*, 2017 NSSC 17, at paragraph 8:

> …The purpose of that meeting was to consider the procedure for the second stage of the hearing. David Coles, Q.C., counsel for the CBC and his instructing solicitor provided an undertaking to the Court agreeing that any confidential information received in the course of the second stage would be kept confidential.

[22] The approach suggested by the Crown has no applicability to the matter before this Court as the cases they rely upon involve confidential police informants and the Court must not extrapolate that procedure to this. Confidential informers are a unique class of persons. Their identity is to be protected and such is well-settled law.

[23] The Court, says Mr. Coles, must look at the decision in *R v. Mentuck*, 2001 S.C.C 76 and determine whether any shielding is justified. The decision in *R. v. Basi*, 3 S.C.R. 389 as relied upon by the Crown can not properly be applied to this application nor is the reasoning in *Winnipeg Free Press*, 2006 MBQB 43 applicable, again because they are informer privilege scenarios. The Crown is wrong in its approach. Neither Basi, nor *Winnipeg Free Press*, establish a framework that is applicable here. It is neither robust nor flexible as the Crowns suggest.

<u>Crown</u>

[24] The Crown in its brief dated June 26, 2020 outlines a recent history of the proceedings in this matter including:

- **May 19:** … By court order, ITO 673 is released to the Applicants and the public in vetted form.

- **May 25:** by court order, ITOs 638, 641, 642, 651 and 668 are released to the Applicants and the public in vetted form, along with vetted versions of associated Reports to Justice and the judicial authorization in question. Because the Production Order associated to ITO 667 had not yet been executed, it was held back to be released once that process was complete.

- **June 12:** by court order, ITO 667 is released to the Applicants and the public.

[25] Details previously vetted were released as part of the Crown obligation to review and reassess. A summary of the redactions for all 7 ITO's was filed.

[26] Existing law in the area of disclosure of privileged and/or confidential information is applicable. The approach in *Winnipeg Free Press*, provides guidance. It has a developed s. 487.3 procedural framework with some modification suggested, specifically, there would be no confidential undertaking by Applicant's counsel. The Crown has already "vetted" materials which have been released along with a table of reasons for the same.

[27] In determining procedure, the Crown suggests, quite rightly, the law informs procedure and not vice versa. In that vein, the Crown acknowledges the presumptive open Court principle but argues that there are times when:

> …public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration* (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at para. 4.)

[28] *Winnipeg Free Press*, provides at paragraph 13:

> It is necessary that there be a flexible approach adopted to deal with such matters. A flexible approach serves to maintain the integrity of the judicial system. There is case law which supports the need to develop a process in these types of circumstances to protect any confidential information or issues of privilege. Those cases include….

[29] Further at paragraph 14:

> The case law holds that the Court must establish a procedure to be used which will serve to protect any confidential information both by hearing *arguments in camera* and inspecting the material privately. The procedure adopted in this case served to balance the interest of the respective parties, protect confidential information and provide appropriate security for privacy interests.

[30] The issue for this Court becomes how do I adhere to the principle of an open Court while balancing the need to protect confidential and/or privileged information. The integrity of the judicial system is utmost as is the public interest in a complete criminal investigation. The public has a stake in both interests. How does one make way for the other? Can they co-exist? How do they co-exist? There are many competing interests.

[31] The Crown relies on *Basi,* as an illustration where these interests have collided. The court struck a balance such that information that should be protected, was, but with scrutiny by the court *in camera* and by allowing the Applicant participation as well at the appropriate point.

[32] There have been many decisions on how proceedings are heard, what aspects are *in camera* and *ex parte*, how and when does the Applicant participate, are undertakings used, and the like. *Basi* addresses those questions and provides a clear path which is both efficient and orderly. Unfortunately, in some instances, counsel for the Applicant simply are not part of the "circle of privilege", not because they are untrustworthy or do not appreciate their roles as officers of the court but because of the nature of the judicial authorization. Mr. Covan argues, certain known individuals, such as Crown Counsel Attorneys as established by legislation, to be within this 'circle'. There is no legal authority for a court to have a lawyer enter an undertaking.

[33] Justice Campbell in *Doe* erred in suggesting an undertaking given the nature of the information. The Crown expanded upon the excerpt Mr. Coles referenced. Putting in context his comments, Mr. Covan referred to the remainder of paragraph 8:

> …As it turns out, no further evidence was put forward by the Plaintiffs and no confidential information was disclosed. That is likely for the best in any event. The confidentiality of the identify of a police informer should be absolute and information that might lead to identification should not be properly be shared even with legal counsel who agree to maintain the confidentiality of the material.

[34] The Crown is extremely concerned with the protection of the investigation of this mass shooting and privacy interests. Any slippage, leakage or inadvertent disclosure could compromise such. Section 487.3 protects such. *Basi* is robust and flexible and should be applied as urged.

<u>Legal Principles and Analysis</u>

[35] *R v. Brassington* [2018] 2 S.C.R. 616 refers to the scope of an identified privilege and to what extent, if any, it should be pierced. Piercing is not at play here, this application is a question of scope only.

[36] In issuing a sealing order, a Judge is charged with determining what, if any, privileged information is covered such that, to use the words of s. 487.3, 'the ends of justice are not subverted by its disclosure'. It therefore follows logically such must be determinative of how the unsealing of a judicial authorization caught by that section is carried out. Sealing orders granted pursuant to s. 487.3(2) cover not only confidential informers. It also refers to the nature and extent of an ongoing investigation as well as other grounds.

[37] To reiterate, Mr. Coles argues the cases suggested by the Crown are not applicable as the Crown has stated this is not a confidential informer scenario.

[38] This Court disagrees.

[39] The law from *Basi* is clear. A "first stage" hearing is needed to determine if in fact a privilege as claimed by the Crown exists.

[40] Justice Fish, speaking for a unanimous Court in that decision stated:

> [38] Whenever informer privilege is claimed, or the court of its own motion considers that the privilege appears to arise, its existence must be determined by the court *in camera* at a "first stage" hearing. Even the existence of the claim cannot be publicly disclosed. Ordinarily, only the putative informant and the Crown may appear before the judge….

[41] The burden is on the Crown to establish on a balance of probabilities that a privilege exists (*Basi,* para. 39).

[42] *Basi* continues:

> [44] …'while the judge is determining whether the privilege applies, all caution must be taken on the assumption that it does apply'…. No one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies. It follows that the trial judge erred in permitting defence counsel to hear the testimony of an officer tending to reveal the identity of the putative informant at the "first stage" hearing.
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> [45] To hold otherwise is to place defence counsel in an awkward and professionally undesirable position. The concern is not that defence counsel would intentionally violate their undertakings or the court order; rather, it is that *respecting* the undertakings and court order would, at best, strain the necessary relationship between defence counsel and their accused clients.
>
> [46] Defence counsel would have to remain constantly on guard never to say or do anything, even inadvertently, that might tend to reveal the informant's identity. This exceedingly onerous constraint would by its very nature 'prevent frankness and fette[r] the free flow of information between lawyer and client', and otherwise impair the solicitor-client relationship … In certain cases, defence counsel might feel bound to withdraw their representation, caught in a conflict between their duty to represent the best interests of their client and their duty to the court not to disclose or to act on the information heard *in camera*.
>
> [47] It is true that defence counsel gave their undertakings of non-disclosure with the consent of their clients. At the time, however, the privileged information was otherwise inaccessible to both the accused *and* their counsel. Once the information is in the hands of their counsel, the consent freely given beforehand might understandably be viewed by the accused as consent given without choice. And consent thought to have been given without choice, even if not repudiated, is bound to be resented.

[43] In *Brassington*, Justice Abella for the Supreme Court of Canada stated:

> [42] I agree with the Crown that the 'innocence at stake' paradigm applies because defence counsel are outside the 'circle of privilege'. In Basi, Fish J., for the Court, confirmed that defence counsel are not bound by informer privilege and are 'outside the circle'." He held that permitting defence counsel to have access to informer-privileged information subject to an undertaking that they would not disclose the information to their clients would be improper, since 'no one outside the circle of privilege may access information over which the privilege has been claimed until a judge has determined that the privilege does not exist or that an exception applies' (para. 44). He went on to observe the problems inherent in bringing defence counsel into the 'circle'….
>
> [45] More recently, in *Barros*, the Court again considered and rejected the argument that the defence-and in particular its agents, the investigation-was bound by informer privilege:
>
> > 'the duty to protect and enforce privilege rests on the police, the Crown and the courts, but we have been referred to no prior case where the duty has been extending to the accused and his or her representative…apart from the exceptional case of in advertent disclosure to defence counsel….[para. 37]'

> [46] Since defence counsel are outside the circle of privilege, it is no answer for the police officers to say that the risk to the informer posed by disclosure to defence counsel is low…
>
> [48] In effect, the police officers are inviting this Court to establish a new exception to informer privilege sourced in the right to solicitor-client privilege. I would, with respect, reject that invitation, not only because this Court has made clear that it will not create new *ad hoc* exceptions to informer privilege, but also because the police officers' argument is predicated on a misconception of the right to solicitor-client privilege, and of how it interacts with other legal obligations (in this case, informer privilege). Solicitor-client privilege protects from disclosure and compulsion the accused's communications with counsel, subject to very narrow, limited exceptions… It does not, however, provide a licence to the client to communicate information that is otherwise protected from disclosure if it tends to identify a confidential informer. In other words, although solicitor-client privilege provides a near-impenetrable shield for communications with counsel, it is not a sword that can be wielded to pierce informer privilege.

[44] As defence counsel is outside the 'circle of privilege' any disclosure of information where none is permitted by law is improper. In *Basi* at paragraph 30:

> The inevitable result of the trial judge's decision was to require the Crown to reveal to defence counsel information over which the informer privilege has been claimed. As defence counsel are outside the 'circle of privilege', permitting them access to this information-even subject to court orders and undertakings-constitutes *inevitable disclosure of the information*. And while the trial judge sought to restrict this disclosure of privileged information to defence counsel, who were prohibited from sharing it with anyone, her decision constituted an order of disclosure nonetheless.

[45] Section 650 of the Criminal Code refers to the right of an accused to be present during the whole of their trial. Though there is no accused per se in this matter, I believe the decision in *R v. Lucas* [2014] O.J. No. 3471 to be applicable. The Ontario Court of Appeal held that an *in camera*, *ex parte* hearing does not breach an accused's right pursuant to that section (see paras: 64-70).

[46] There is nothing in s. 487.3 which permits the Applicants to have access to any protected information. As noted by Justice Bellefontaine in *R. v. Stratton,* [2009] O.J. No. 1760 at paras. 15-17:

> [15] The CBC have requested an opportunity for a single private viewing of the video material under the supervision of a court officer for all accredited media representatives. I

am mindful of the fundamentally important role the press and media play in communicating the evidence, and the functioning of the courts, to the public. Further that societies interest in having this information communicated to the public can practically speaking only be obtained from the newspapers or other media. As well, there is significant merit to allowing the media to the best access to the most accurate information to ensure the accuracy and completeness of the reporting, and further provide the highest level of scrutiny on the functioning of the Court. I am also sympathetic to the argument that having the media to rely on summaries prepared by Counsel, or facts agreed on by Counsel, or arguments made by Counsel, risks the accuracy of the reporting and risks the public perception that the media made be seen to be mouth pieces of Counsel. Additionally, I am satisfied that we have a professional and reasonable media who would be unlikely to abuse a private opportunity to view the video tapes and could be held accountable for any abuses of that opportunity.

[16] I am concerned however, that there is no basis in law for granting the media a higher right to access to the evidence and I have allowed the general public. Philosophically, as the medias right to access preserved under s. 2(b) of the *Canadian Charter of Rights and Freedoms* flows from the public's right to information, it seems incongruous that the media should have a greater right to access than the general public would. Providing for greater legal rights for the media would also be inconsistent with the concept underlying s. 15 of the Charter, which would provides that every individual is equal before the law.

[17] In 1995, Justice Lesage dealt directly of the media rights in *R v. Bernardo* at paragraph 119 and stated:

> 'While the Supreme Court of Canada held in *Dagenais* that the rights of the media are important and must be considered in a criminal trial, that does not raise the media status above the rights of other parties'.

[47] *Basi* continues:

> [55] In order to protect these interests of the accused, trial judges should adopt all reasonable measures to permit defence counsel to make meaningful submissions regarding what occurs in their absence. Trial judges have broad discretion to craft appropriate procedures in this regard.
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> [56] Measures that a trial judge may wish to adopt in assessing a claim of informer privilege include inviting submissions on the scope of the privilege — including argument as to who constitutes a confidential informant entitled to the privilege — and its application in the circumstances of the case. Defence counsel may be invited as well to suggest questions to be put by the trial judge to any witness that will be called at the *ex parte* proceeding.
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> [57] In appropriate cases, fairness may require the court to provide the defence with a redacted or summarized version of the evidence presented *ex parte* — edited to eliminate any possibility of disclosing the informant's identity — so as to permit the trial judge to receive additional submissions from the defence on whether the privilege applies in the particular circumstances of the case. In particularly difficult cases, the trial judge may appoint an *amicus curiae* to attend the *ex parte* proceeding in order to provide assistance in assessing the claim of privilege.
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> [58] In the present case, permitting defence counsel to make submissions and to propose questions to be put by the court to the witness at the *ex parte* hearing

> might well have been appropriate. The trial judge, however, will be in a better position to decide how best to craft safeguards that mitigate any potential unfairness arising from the *ex parte* nature of the proceedings. The adoption of appropriate initiatives is therefore best left to the trial judge.

[48] Mr. Coles urged the Court to consider the law as it now stands in *Mentuck*, when considering this matter. I have done so and reiterate what McKelvey, J. said in *Winnipeg Free* Press, at paragraph 48, that the *Mentuck* test is meant to be flexible and applied in the context before the particular court.

[49] Fish, J. in *Toronto Star Newspapers Ltd. et al. V. Ontario* [2005], 2 S.C.R. 188, stated at paras 1-5:

> [1] In any constitutional climate, the administration of justice thrives on exposure to light – and withers under of cloud of secrecy.
>
> [2] That lesson of history is enshrined in the *Canada Charter of Rights and Freedoms.* Section 2*(b)* of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
>
> [3] The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; and others, permanent protection is warranted.
>
> [4] Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively 'open' in Canada. Public access will be barred only when the appropriate court, and the exercise of its jurisdiction, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration*.
>
> [5] The criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this court in which the governing principles were established and refined. The issue in this case is whether that test, developed in the context of publication ban at the time the trial, applies as well as the pre-charge or 'investigative stage' of criminal proceedings. More particularly whether it applies to 'sealing orders' concerning search warrants and the information upon which their issuance was judicially authorized.

[50] He concludes at paras. 6-9:

> [6] The Court of Appeal for Ontario held that it does and the Crown now appeals against that decision.
>
> [7] I would dismiss the appeal. In my view, the *Dagenais/Mentuck* test applies to *all* discretionary orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values s. 2*(b)* of the Charter.
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> [8] The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution and opting for full and immediate disclosure.
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> [9] Even then, however a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favor its secrecy rather than openness, a plainly unacceptable result.

[51] In *R v. Canadian Broadcasting Corp.*, [2018] O.J. No. 4585 the CBC sought to unseal redacted portions of ITO's in an investigative fraud case. Crown was opposed, suggesting such would comprise the ongoing investigation. Goldstein J. agreed, and the portions that were redacted would remain so as such were 'properly subject to investigative privilege' (see para. 3). In making his determination Justice Goldstein provided a chart to Crown counsel that was not shared with the Applicant. The purpose of the same was to advise Crown counsel what needed to be justified, while others were self-evident on their face and should not be released.

[52] Justice Goldstein made five general observations about the current nature of criminal investigations, adding that his comments should not be taken to say anything one way or other about the particular case (see para. 9).

[53] I believe his words bear repeating, and echo his sentiments that they do not necessarily apply in any regard in this matter.

[54] Paragraphs 9-10 continue:

> [9] * First, these investigations have grown ever more complicated. This case is an example. The police have seized over 4.2 terabytes of information. They searched several locations. The ITO has well over 100 pages. There are many different financial transactions involved. The RCMP requires outside expertise. These sorts of cases often have international aspects and may require mutual legal assistance treaty requests.
>
> * Second, these investigations are invariably intertwined with civil proceedings. The parties and witnesses in those civil proceedings are usually witnesses or targets of the police investigation. The targets of the criminal investigation are discoverable and compellable in civil litigation. Individuals who are parties to the civil litigation but not targets of criminal investigation may be reluctant to talk to the police.
>
> * Third, there may be related litigation over the search itself. For example, in this case, a claim of solicitor-client privilege has been made and that laborious process must play itself out.
>
> * Fourth, as Zuker J. observed in a different context in *R v. Lubbell (1973), 11 C.C.C. (2d) 188 (Ont H.C.),* a search warrant is an investigative tool. It is carried out at an early stage of the proceeding. The authorities often don't know what they have until they carry out a review of the seized material. In this case, they cannot even do that review just yet as much of the seized material is still sealed.
>
> * Finally, there are situations where delayed disclosure properly balances society's often conflicting interests in proper law enforcement and the open court principle: *Toronto Star V. Ontario [2005] 2 S.C.R. 188*, 2005 S.C.C. 41 at para. 31. In this case the Crown has not asserted a class privilege such as an informant privilege. The Crown has only asserted litigation privilege. That means that the ITO is likely to be sealed forever. I realize that it is not satisfactory to be told 'be patient, you will get the information eventually' but that is sometimes a realistic response to competing interests.
>
> [10] Some of these factors militate in favour of greater openness, and some militate in favour of protecting the sources and methods used by law enforcement. Each case obviously turns on its own facts in that regard. But these are some of the factors that place in modern investigations that a court must balance.

[55] He then reviewed s. 487.3, and what a justice or judge must balance in determining whether ITO's and warrants, or other judicial authorizations, should be

sealed. He also referenced *MacIntyre,* wherein the presumption of openness is the rule once a warrant has been executed. At para 20:

> The number of investigative tools available to the authorities has changed significantly since 1982. That has obviously required a change in the approach mandated by *MacIntyre*. In 1982 there were no general warrants, tracking warrants or digital number warrants. The purpose of a general warrant that authorized a surreptitious "sneak and peek" would surely be frustrated if the presumption of secrecy shifted immediately upon execution.

[56] It is clear from the redacted ITO's currently before this Court, and Crown submission, they are opposed to release of further information because of the ongoing investigation. It appears on its face, from the materials received, and comments made by counsel, to be a major investigation in terms of geography, witnesses, exhibits, and the like. We know at this point that there are some 23 judicial authorizations, seven of which are the basis of this Application.

[57] This Application came to the court only 10 or 11 days after this mass shooting in our province. Some ITO's were sworn, and sealing orders issued, before the total number of deceased persons was even known.

[58] Judicial authorizations related to ITO's 20-638, 20-641, 20-642 refer to an investigation into the murders of more than 15 people.

[59] Judicial authorizations related to ITO's 20-651, 20-667, 20-668, 20-673 refer to it as an investigation of the murders of more than 20 people and a 'killing spree that covered in excess of 50 kilometers' (ITO 20-0642). The ITO 20-0673 and corresponding search warrant were issued only 4 days before this application was received, on April 24 at 6:41p.m..

[60] In the redacted affidavit of Sgt. Angela Hawryluk, RCMP, sworn June 25, 2020 she states:

> [3] On April 18th and 19th of 2020, GABRIEL WORTMAN went on a crime spree which resulting in him killing 22 individuals in various locations across the province of Nova Scotia…
>
> [8] The investigation focuses upon determining and understanding the actions of GABRIEL WORTMAN as well as any individuals who may have rendered assistance to him either before or during the events.
>
> [9] To date, approximately 200 police officers from approximately 6 law enforcement agencies have been involved in the investigation of these crimes across Canada and within the United States of America.
>
> [10] The crimes conducted by GABRIEL WORTMAN resulted in the RCMP identifying approximately 17 separate crime scenes.
>
> [11] To date, the RCMP investigation have identified in excess of 1586 separate tasks to be completed.
>
> [12] Of these tasks, over 700 relate to witness interviews.
>
> [13] A tip line was created to allow the public to provide relevant information to the investigation.
>
> 13.1. To date, the RCMP have received approximately 172 tips from this tip line.
>
> [14] To date, over seven hundred exhibits have been seized in the course of this investigation.
>
> [15] To date, over 250 exhibits have been forwarded for forensic analysis at laboratories.
>
> [16] To date, we have received no laboratory results back since the submission of these exhibits.

[61] The ITO's seeking sealing orders in this application reference as grounds. the ongoing investigation and the need not to compromise the same, with the exception of JPC #20-673, which has as it grounds, 'the investigation is on going'.

[62] Efficiency is obviously important in having this dealt with as soon as practicable from a public standpoint.

[63] Mr. Coles is concerned that if the flexible approach suggested by the Crown is used then the timelines cannot be met. He may be correct, but again these matters are of great importance and must be done both efficiently, and according to law.

[64] I find the procedure as suggested by the Crown to be the most efficient framework within which to deal with the procedure on this Application. I agree with Justice Goldstein that front loading is appropriate. A triage process will result in efficiency.

[65] I refer to the time frames and information currently before the Court simply to reiterate that given what appears to be the relatively early stages of this investigation, an *in camera* and *ex parte* process is necessary. Once such is done a determination of the Crown claims will be decided.

[66] I have taken what I consider to the best practices from the cases referred to, keeping in mind s.487.3 and the grounds for granting a judicial authorization, as well as the open court principle, and will proceed in the following manner:

> **Stage 1**: The Crown must establish whether a privilege exists, *in camera and ex parte*, and the scope of the same.
>
> **Stage 2**: The Crown must establish the validity of any claims. This must be established on a *prima facie* basis. The Crown will present their Affiant(s) for questioning by the Court, *in camera and ex parte.*
>
> - Mr. Coles can provide any written or oral submissions regarding the scope of the Crown claims in advance of stages 1 or 2.

- Mr. Coles can provide to the Court, in advance, any questions he wishes the Court to ask of the Affiant(s) and this does not have to be disclosed to the Crowns.

- If necessary, the Crown can direct questions to its Affiant(s) if required so as to provide a complete narrative and/or make the sworn evidence current.

- An undertaking is not an appropriate mechanism to be used in either of these stages. It has no basis in law and can certainly create scenarios of inadvertent disclosure and/or counsel having to withdraw because the nature of what was undertaken by counsel was not fully appreciated by clients.

- A determination will be made by the Court as to how to convey to the Applicants the *in camera* evidence. In *Oland* a vetted transcript was produced which in and of itself requires time. Such can only really be determined once stage 1 and stage 2 have occurred. It may be needed, it may not be.

Stage 3: Cross examination by the Applicants of the redactions the Court has moved into this stage. If a need arises to go *in camera* either *ex parte* or not, that determination will be made at the time.

Stage 4: For lack of a better term, will include out of necessity, the Court determining if there are third party interests where notice is required. This will be interwoven as part of the foregoing stages.

[67] After stage 3, the Applicants and Respondents will present argument to the Court on their respective positions on the validity of the claims by the Crown.

[68] Counsel have said on many occasions since the beginning of this Application, the Court sets its own procedure. I believe this procedure is based in law, is efficient and will balance the competing interests outlined in *MacIntyre*.

Laurel Halfpenny MacQuarrie, JPC